

EDITORIAL

CHILDREN: CONSUMER GROUPS' DREAM, ADVERTISERS' NIGHTMARE?

Children's advertising has always been the subject of impassioned debate. This is understandable. Parents are rightly suspicious of outside influences on their children, and advertising often appears to be an intrusion akin to the strange man offering sweets outside playgrounds.

More subtly, it is also accused of increasing 'pester-power', a term suitable for the late twentieth century, designed to explain modern parents' decreasing control over their children's preferences and habits. Behind much of this is something very old-fashioned and political: the big food advertisers (some of the biggest companies in the world) sweet-talking children, who are tiny, innocent and, above all, gullible.

The most recent criticisms of advertising to children are based on two essential premisses. The first is that advertising messages have a power and status that exceed parental guidance and educational influences. No research findings are ever offered for this assumption. This is because no research into advertising anywhere in the world has ever come to this conclusion.

The second criticism is that the extent of advertising of certain foods aimed at children (notably sugared confectionary, snacks and soft drinks) undermines nationally agreed public health policies which seek to improve the nation's diet.

This is based on the conviction that the market should implement government policies, and is related to a wider perception of the Government as the arbiter of personal habits.

The UK Governments' food policy, set out in the *Health of the Nation* White Paper, of fixing targets for the improvement of the nation's eating habits and for the reduction of various diet-related diseases, has been manipulated into a powerful argument for advertising restrictions on certain foods to certain audiences.

However, the Government itself has not approved the connection between the official encouragement of better eating habits and selective restriction on the marketing of foods. Despite the orchestrated noise of campaigning, it remains unlikely to do so.

It is well known that there are comparatively few complaints from the general public about food advertising. Only consumer groups qualify this area as 'sensitive' and use this qualification as a basis for demanding restrictions in advertising.

The ASA and the ITC are right to reject such demands. If the self-regulatory bodies do not concentrate on actual complaints from the general public, and instead worry about consumer group agendas, then the great strength of self-regulation as a more effective control than detailed legislation will ebb away and eventually expire.

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Dr Karin Newman is on holiday

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Restrictions on Television Advertising and Article 10 of the European Convention on Human Rights

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The recent case-law of the European Court of Human Rights made clear that 'information of a commercial nature' falls under the protection of article 10 of the European Convention on Human Rights (ECHR) and that the legitimacy of legislation on television broadcasting has to be evaluated from the scope of the second paragraph of article 10. Until now, however, the repercussions of these qualifications are not very clear as to the practical effect on the protection of television advertising under article 10 ECHR. This paper analyses the scope and effect of the guarantee of the right of freedom of expression and information provided by article 10 ECHR with regard to the legitimacy of limitations imposed on television advertising by public authorities. It is argued that the freedom of commercial speech is not given very much additional protection within the framework of article 10 ECHR.

INTRODUCTION

Before analysing the admissibility of restrictions on television advertising from the perspective of article 10 ECHR (paragraph 4), the general perspective and the main features of the protection of article 10 ECHR will be discussed first. In order to do this, the global institutional and legal framework of article 10 ECHR will be analysed (paragraph 2), as well as the general characteristics of the construction of article 10 ECHR and its protection of the freedom of expression and information (paragraph 3).

BROADCASTING LAW, TELEVISION ADVERTISING REGULATION, THE COUNCIL OF EUROPE AND ARTICLE 10 ECHR

1. The European Convention on Human Rights is the central treaty instrument within the European Council's framework (for a general introduction, see Cohen

Jonathan, 1989 and Van Dijk and Van Hoof, 1984). With regard to the European media regulation in general and the regulation of television advertising in particular, narrow attention should be paid to article 10 of the Convention that guarantees the freedom of expression and information, regardless of frontiers. The freedom of expression and information, as embodied in article 10 ECHR, is seen as one of the essential principles of a democratic society and one of the basic conditions for its progress and for the development of every man and woman. It forms the basis for media law and media policy within the Council of Europe and its present 27 member states.

Within the Council of Europe article 10 ECHR is not only the fundamental basis for mass media policy and mass media law in the future (*de lege ferenda*); it is also an actual binding legal instrument *de lege lata* for its member states. The application of the ECHR is supervised by the organs of the European Convention: the European Commission of Human Rights, the Committee of Ministers and the Strasbourg European Court of Human Rights. Article 1 of the Convention requires member states to secure for everyone within their jurisdiction the rights guaranteed by article 10. A person or group who alleges that he is a victim of a violation of the Convention may bring a claim to the Commission, whilst the Commission has the power to refer the case to the Court. The judgments of the European Court of Human Rights may make changes in domestic law necessary. In most member states, the Convention is incorporated in domestic law, so that the rights and freedoms of the Convention are directly enforceable before the national courts in these member states (self-executing character of the Convention, internal and direct effect and priority of the ECHR in the member states). After exhaustion of all domestic remedies, an application can be made to the Commission.

2. In recent years, broadcasting law has strongly developed within the legal framework of the Council of Europe in which article 10 ECHR functions as the fundamental basis, together with the principles set forth in the Declaration of Freedom of Expression and Information (Committee of Ministers, 1982). In this document, it is declared that in the field of the mass media the following objective has to be achieved: 'The protection of the right of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them under the conditions set out in Article 10 of the European Convention on Human Rights'.

Important steps have also been taken by the European 'Media-Ministers' at the conferences of Vienna (1986), Helsinki (1988) and Nicosia (1991). The declarations and resolutions of these conferences clearly draw the attention to article 10 of the ECHR as a basic reference for European media law. In many countries, media law, broadcasting regulations and codes and legislation on television advertising are worked out on the basis and within the framework of the protection of article 10 ECHR.

3. In the European Convention on Transfrontier Television (15 March 1989) too, the emphasis has been laid on the impact of article 10 ECHR. In its preamble, the European Television Convention considers that 'the freedom of expression and information, as embodied in article 10 of the ECHR, constitutes one of the

essential principles in a democratic society and one of the basic conditions for its progress and for the development of every human being'. According to article 4 of the Television Convention the Parties

shall ensure freedom of expression and information in accordance with article 10 ECHR and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention.

(Council of Europe, 1989)

Thus, within the framework of broadcasting law and television advertising regulation, article 10 ECHR is becoming an essential factor both on the national and on the European level.

4. Moreover, article 10 ECHR has also implications on the EC law. This is explicitly recognized in the case-law of the Court of Justice. In some recent judgments the Court of Justice confirmed earlier jurisprudence that recognizes the effect of the ECHR within the legal order of the European Community (Nold, 1974). In both cases on cable distribution regulation in the Netherlands, the Court of Justice expressed the opinion that

en effet, le maintien du pluralisme . . . est lié à la liberté de l'expression, telle qu'elle est protégée par l'article 10 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, qui figure parmi les droits fondamentaux garantis par l'ordre juridique communautaire.

(Stichting Goudse Kabel, 1991; Commission vs. The Netherlands, 1991)

In its judgment of 18 June 1991 the Court of Justice has been even more explicit with regard to the implementation of article 10 ECHR in EC community law. According to the Court of Justice,

les limitations apportées au pouvoir des Etats membres d'appliquer les dispositions visées aux articles 66 et 56 du traité pour des raisons d'ordre public, de sécurité publique et de santé publique, doivent être appréciées à la lumière du principe général de la liberté d'expression, consacrée par l'article 10 de la convention européenne des droits de l'homme.

(Elliniki Radiophonia Tileo-rassi, 1991)

More generally, in the new Treaty on European Union, article F of title I of the common provisions provides that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Further, with regard to the co-operation in the cultural and audiovisual sector, in article 128 of the new EC Treaty it is mentioned that 'the Community and the Member States shall foster co-operation with third countries and the competent international organizations in the sphere of culture, in particular the Council of Europe' (Treaty on European Union, 1992). Furthermore, in the preamble of the EC Directive of 3 October 1989 on 'television without

frontiers', the freedom of expression of article 10 ECHR as ratified by all EC member states, is explicitly mentioned as a specific expression of a more general standard in Community Law (Council of European Communities, 1989).

5. It is obvious that article 10 ECHR as an important legal instrument offers the fundamental framework for audiovisual media regulation in Europe today and tomorrow, both within the scope of the Council of Europe and within the European Union of the European Community.

THE PROTECTION OF FREEDOM OF COMMUNICATION AND ARTICLE 10 ECHR

The construction of article 10 ECHR

1. Article 10 of the Convention provides the following:
 - (i) Everyone has the right to freedom of expression. This right shall include to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
 - (ii) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
2. Article 10 guarantees the freedom of expression and information, i.e. the right to freedom of expression and the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 10 ECHR explicitly does not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

Conditions and restrictions on the freedom of expression and information (we also use the term 'freedom of communication' – see also Voorhoof, 1987) are only legitimate in so far as they are compatible with the criteria set forth in paragraph 2 of article 10. The second paragraph of article 10 contains the limitative enumerated and restrictive exceptions of legitimation to restrain freedom of communication. With regard to the evaluation of these restrictions, according to the European case-law, 'the Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted' (*Sunday Times*, 1979). This kind of approach by the European Court can be seen as a recognition of the 'preferred position' of the freedom of communication. Hence, the supervision by the Court must be a strict one, because of the importance of the right guaranteed in article 10: the necessity restricting this fundamental right of freedom of expression and information must be 'convincingly established' (Autronic, 1990).
3. Furthermore, according to article 10, paragraph 2, there are three conditions that

must cumulatively be fulfilled. If one of these conditions is neglected, the restricting rule with regard to the freedom of communication must be regarded as an infringement of article 10 ECHR (see also Korff, 1988).

First, restrictions must be 'prescribed by law', which means in the European Court's case-law that any restricting rule must meet the criteria of precision and accessibility (*Sunday Times*, 1979). This means that the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. It means also that any restricting norm must be formulated with sufficient precision so that the citizen is able, if need be with appropriate advice, to foresee the consequences which a given action may entail to a degree that is reasonable in the circumstances. Of course, the European Court is aware of the fact that laws are framed in a manner that is not absolutely precise and that the interpretation and application of the constantly changing legislation in the field of the mass media are inevitably questions of practice. In so far as there is a clear and consistent case-law on the matter, this case-law is seen as enabling journalists, publishers, media companies, commercial operators and their advisers to regulate their conduct in the relevant sphere (Markt Intern, 1989; Groppera Radio, 1990; *Sunday Times*, 1991). However, if the legal basis shows a lack with respect to the required clarity and precision because no criteria are indicated for the application of the law, this restriction will not deserve the status of 'law' within the meaning of article 10 ECHR (Autronic, 1990).

Second, Any restriction must pursue a legitimate aim as foreseen in paragraph 2 of article 10. These legitimate grounds for restricting freedom of communication can be situated in several groups of interests:

- (i) The interests of national security, territorial integrity, public safety (interests of the state);
- (ii) The maintaining of the authority and impartiality of the judiciary (interests of the jurisdiction);
- (iii) The prevention of the disclosure of information received in confidence (interests of the administration of public authorities and the administration of justice; interests of secrecy and privacy);
- (iv) The prevention of disorder or crime (general interests of society);
- (v) The protection of health or morals (interests of the population in general);
- (vi) The protection of the reputation or rights of others (private interests, rights of individuals).

Third, The 'necessity test in a democratic society' is the most decisive and ultimate criterion: any restriction on the freedom of communication imposed by a public authority must be proven to be really necessary in a democratic society. The Court has noted that, whilst the adjective 'necessary' within the meaning of article 10 paragraph 2, is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. There must be a 'pressing social need' for any restriction on this freedom of communication. The Commission and finally the Court are supervising the application of article 10, by examining this criterion sharply and by evaluating the pertinent and proportionate character of the restrictions in

- question. This means that every formality, condition, restriction or penalty imposed in the sphere of freedom of communication must be proportionate to the legitimate aim pursued. The Court is empowered to give a final ruling on whether a restriction or penalty is in accordance with the freedom of expression and information with due regard to the importance of this freedom in a democratic society. In its case-law the Court has consistently held that the contracting states have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to a European supervision as regards both the legislation and the decisions applying it. The extent of the European supervision can vary according to the case and the legitimate aim involved. The scope of domestic power of appreciation is, in other words, not identical for each of the aims listed in article 10 paragraph 2. Thus there is, for example, a lower degree of supervision with regard to the interpretation of 'morals': the national authorities are considered to be, in principle, in a better position than the international judge to give an opinion on the exact content of these requirements, which vary strongly from state to state. There is no uniform European conception of 'morals' (Handyside, 1976; Müller, 1988). With regard to restrictions in the field of 'commercial speech' there also seems to be a lower degree of supervision by the European Court (cf. *infra* paragraph 4).

According to the case-law of the European Court of Strasbourg the contracting states enjoy a certain margin of appreciation in assessing whether and to what extent interference is necessary, but this margin goes hand-in-hand with a European supervision covering both the legislation and the decisions applying it; when carrying out that supervision, the Court must ascertain whether the measures taken at the national level are justifiable in principle and proportionate (Groppera Radio, 1990). In the 1991 *Sunday Times* case the Court clearly defined its task as follows:

The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.

(*Sunday Times*, 1991. See also Oberschlick, 1991; Schwabe, 1992).

Other recent cases (Barfod, 1989; Markt Intern, 1989) have shown that in fact an internal discussion is going on within the European Court of Human Rights about the extent to which the Court is carrying out a 'European supervision'. In the Markt Intern case the Court, by a nine to nine voting, was of the opinion that the European Court of Human Rights should not substitute its own evaluation for that of the national courts, where those courts, on reasonable grounds, had considered the restrictions to be necessary (Markt Intern, 1989).

Thus, in some judgments on article 10 ECHR, this margin of national appreciation is given a relative autonomy, which is both a recognition of the national diversities in the context of the European legal order as a reduction of the importance of the European supervision over the implementation in national law and practice of the freedom of communication. In some of the jurisprudence of the European Court of Human Rights about article 10 ECHR, the national authorities are compelled to provide a higher level of protection of freedom of information and freedom of public speech (see e.g. *Sunday Times*, 1979; Barthold, 1985; Lingens, 1986; Weber, 1990; Oberschlick, 1991; *Observer/Guardian*, 1991; *Sunday Times*, 1991; Thorgeirson, 1992; Castells, 1992; Schwabe, 1992). In other jurisprudence a higher level of autonomy seems to be given to the member states in order to keep up restrictions on the freedom of information and expression, especially where it concerns restrictions or sanctions with regard to pornography or obscenity on the one hand and commercial speech on the other (Handyside, 1976; Müller, 1988; Markt Intern, 1989). In the Groppera Radio case too the Court didn't deal very thoroughly with the evaluation of the case, so that the European Court could uphold the admissibility of a prohibition on the transmission of a (commercial) radio programme coming from abroad (Groppera Radio, 1990).

Freedom of communication according to article 10 ECHR

The critical content of the information or ideas

Article 10 envisages the protection of every kind of expression and information, but the effect of article 10 ECHR is especially important for the protection of critical and non-conformist speech.

The Court's case-law consistently emphasized that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. The freedom of expression and information as guaranteed by article 10 ECHR is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.

This means that article 10 has to be interpreted from a standpoint of a high level of protection of freedom of expression, even if this information is harmful either to the state or to some groups, enterprises, politicians, etc. (*Sunday Times*, 1979; Barthold, 1985; Lingens, 1986; Weber, 1990; Oberschlick, 1991; Thorgeirson, 1992; Castells, 1992; Schwabe, 1992). However, the criticism or the offensive publication should remain within certain limits, and it is not always clear where to draw the line (Müller, 1988; Barfod, 1989; Markt Intern, 1989).

The different types of information

1. Article 10 ECHR gives protection both to ideas and to all kinds of information. Not only opinions, philosophical ideas or political speech are protected by article

10, but also facts and news or even factual data or radio and television programme data (Geillustreerde Pers, 1976).

2. Information and ideas are given a high level of protection when they are made public in the context of a political debate, i.e. the protection of public speech (*Sunday Times*, 1979; Barthold, 1985. See also Barfod, 1989; Weber, 1990; Ezelin, 1991; Voorhoof, 1989a). In the 1991 'Spycatcher' cases the Court underlined the importance of free speech on matters of public interest. According to the Court, the Press has the task of imparting such information and ideas and the public has a right to receive them. Were it otherwise, the Press would be unable to play its vital role of public watchdog (*Sunday Times*, 1991; *Observer/Guardian*, 1991).

It is recognized by the Court that for the public the freedom of the press is one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, the Court stated that the freedom of political debate is at the very core of the concept of a democratic society. Moreover, as regards value judgments within the political debate, the requirement of the proof of truthfulness of the statements is impossible to fulfil and would infringe the freedom of opinion itself, which is a fundamental part of the right secured by article 10 ECHR. Thus the truth of value judgments is not susceptible to proof, which gives these opinions and value judgments an even larger scope of protection within the framework of article 10 (Lingens, 1986; Oberschlick, 1991; Castells, 1992; Thorgeirson, 1992; Schwabe, 1992).

3. The European Court's case-law is also giving important support to the freedom of artistic expression, which, in the Court's view, 'affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds' (Müller, 1988). The Court is of the opinion that those who create, interpret, distribute or exhibit works of art, contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation for the state not to encroach unduly on their freedom of expression.
4. Article 10 ECHR also gives protection to commercial information. While there was still some discussion about this viewpoint before and even after the Barthold judgment, in the Markt Intern case the Court stated clearly that the contested article conveyed 'information of a commercial nature' and that 'such information cannot be excluded from the scope of article 10 paragraph 1 which does not apply solely to certain types of information or idea or forms of expressions' (Markt Intern, 1989; see also Voorhoof, 1991a). Yet it has to be noted that the protection of commercial information and commercial advertising seems to be situated on a lower level than for example political speech (Church of Scientology, 1979; Liljenberg, 1983; Markt Intern, 1987; see also De Meij, 1989). In paragraph 4 the protection of commercial speech under article 10 ECHR will be analysed more thoroughly.

The different types of mass media

As a matter of fact, article 10 does not apply only to the content of the information, but also to the means of information of transmission and reception, since any restriction imposed on the means necessarily interferes with the right to receive and impart information (Autronic, 1990).

1. According to the Court's case-law, the Press plays an important role (*Sunday Times*, 1979; Lingens, 1986; Barthold, 1985; *Sunday Times*, 1991; *Observer/Guardian*, 1991; Oberschlick, 1991; Castells, 1992; Thorgeirson, 1992).

In the Markt Intern case, the Court also recognized the importance of the specialized Press in some sectors. The commercial strategy of an enterprise may therefore give rise to criticism on the part of the consumers and the specialized Press: in order to carry out its task, the specialized Press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities (Markt Intern, 1989).

2. Article 10 ECHR is entirely applicable to radio and television. Article 10 implies the freedom to impart information and ideas 'also by means of radio broadcasts'. In the Groppera Radio case the Court considered that both cable transmission and broadcasting of programmes over the air are covered by the right enshrined in article 10 paragraph 1, without any need to make distinctions according to the content of the programmes (Groppera Radio, 1990). The reception of television programmes by means of a dish or other kind of aerial is also within the right laid down in article 10 (Autronic, 1990).

The last sentence of paragraph 1 of article 10 explicitly mentions certain enterprises that are essentially concerned with the means of transmission. This also allows the states to control the way in which broadcasting is organized in their territories, particularly as far as the technical aspects are concerned, by means of a licensing system. It does not however provide that licensing measures shall not otherwise be subject to the requirements of paragraph 10, for that would lead to a result contrary to the object and purpose of article 10 as a whole. The Groppera Radio judgment has made explicit that the object and purpose of the last sentence of article 10 paragraph 1 and the scope of its application must be considered in the context of article 10 as a whole and in particular in relation to the requirements of paragraph 2 (Groppera Radio, 1990).

In the Groppera Radio as well as in the Autronic case, the European Court has controlled the restrictions on the distribution and reception of radio and television programmes coming from abroad in the context of paragraph 2 of article 10 ECHR.

3. On several occasions the Court has held that article 10 ECHR is both applicable to individuals and to private or commercial mass media (*Sunday Times*, 1979; Markt Intern, 1989; Groppera Radio, 1990; Autronic, 1990). In a report of the European Commission of Human Rights it is mentioned, however, that the protection of the commercial interests of particular newspapers or groups of newspapers is not as such contemplated by the terms of article 10 of the Convention (Geillustreerde Pers, 1976).

In the Groppera Radio case the Court recognized the interests of the different applicants as to the infringement on their freedom of communication, despite obvious dissimilarities of status or role. As direct and legitimate interests in the continued transmission of the radio programmes by Groppera Radio, the Court assumed that for the company and its sole shareholders and statutory representatives, it was essential to keep the station's audience and therefore to maintain its financing from advertising revenue, while for the employees it was a matter of job security as journalists (Groppera Radio, 1990).

In the Autronic case the applicability of article 10 on commercial or profit-making enterprises was even more explicit. In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial, nor the intrinsic nature of freedom of expression could deprive the applicant of the protection of article 10. In other words, article 10 applies to 'everyone', as well as to profit-making corporate bodies (Autronic, 1990).

4. The principle of freedom of communication in the audio-visual sector also raises a problem as to the question whether a broadcasting monopoly and thus the legal impossibility to start up a private radio or television station is a breach of article 10 ECHR. The public broadcasting monopolies as such are not seen as an infringement of article 10 ECHR, although it is becoming extremely difficult to legitimate some restrictions in national broadcasting law in the perspective of article 10 paragraph 2. According to the Court, the insertion of the last sentence of article 10 paragraph 1 was clearly due to technical or practical considerations, such as the limited number of available frequencies and the major capital investments required for building transmitters. This last sentence, according to which the licensing of television broadcasting was not forbidden, reflected the political concern on the part of several states that broadcasting should be the preserve of the state. In recent years, changing political views and technical progress have resulted in most European countries in the abolition of state monopolies and the establishment of private radio and television broadcasting in addition to the public services. It seems that it is becoming difficult to support the existing broadcasting monopolies on the grounds of article 10 paragraph 1 in fine, even more so because the licensing rules should not come in conflict with the second paragraph of article 10. So where in earlier times article 10 ECHR was presented as an argument to legitimate the public broadcasting monopolies (see e.g. X, 1968 and X, 1972), under present-day conditions article 10 ECHR is becoming an important juridical argument against the maintenance of public broadcasting monopolies as such. Recently, the European Commission of Human Rights declared admissible several complaints by private radio stations against the Austrian legislation preventing them from setting up private radio stations (Informationsverein Lentia, 1992). According to the Commission it is in dispute whether only the last sentence of article 10 paragraph 1 or also article 10 paragraph 2 is applicable in the case, and whether these provisions allow a monopolistic system of broadcasting which excludes any possibility to obtain licences for private radio stations. The Commission is now preparing a report on this case. Moreover, one could also argue that other existing monopolies that are institutionalized in recent broadcasting legislation (monopolies on radio or television advertising, monopolies in favour of private broadcasting organizations in certain regions, etc.), are difficult to support in the scope of article 10 ECHR.

The different steps of the communication process

A main characteristic of article 10 ECHR can be seen in its general and far-reaching protection of the different aspects of the process of freedom of communication. This means that article 10 offers protection both to the freedom of

expression, i.e. the freedom to impart information and ideas, and to the freedom of distribution and transmission of information and ideas, as well as to the freedom to receive information and ideas (Groppera Radio, 1990). In the Autronic judgment it is recognized that article 10 also gives protection to the means of transmission or reception, since any restriction imposed on the means necessarily interferes with the right to receive and impart information (Autronic, 1990). In the *Sunday Times* case the Court expressed the viewpoint that the media not only have the task to impart information and ideas on areas of public interest, but that 'the public also has a right to receive them'. In the same judgment the Court observed that article 10 not only guarantees the freedom to inform the public but also the right of the public to be properly informed (*Sunday Times*, 1979. See also *Sunday Times*, 1991; *Observer/Guardian*, 1991).

RESTRICTIONS ON TELEVISION ADVERTISING AND ARTICLE 10 ECHR

Introduction

After this general introduction on the main features of protection offered by article 10 ECHR, further arguments will be given in this paragraph to make clear that the freedom of communication by means of radio and television as well as the freedom of commercial speech are under the global protection of article 10 of the European Convention. At the same time the question has to be raised to what extent protection is given to advertising on television. The analysis of the basic elements of the scope and criteria of protection of commercial audio-visual speech will offer the framework for an answer to the question to what extent advertising regulation on radio and television can be considered as reconcilable with article 10 ECHR.

Article 10 ECHR and the protection of information of a commercial nature

As mentioned above in paragraph 3, article 10 ECHR gives general protection to hold opinions and to receive and impart information and ideas. Although it is clear that the democratic-functional importance of the right to freedom of expression lies at the heart of this fundamental right, the case-law of the European Commission and the European Court offers a clear and explicit interpretation towards the protection of commercial information or commercial speech under the scope of article 10 ECHR. There may have been some influence from US law and the jurisprudence of the Supreme Court according to which 'commercial speech' is protected under the First Amendment (Weinberg, 1982; Lester and Pannick, 1984).

In several cases, the European Commission and the European Court of Human Rights have had the occasion to consider commercial speech and advertising under the protection of article 10 ECHR. This jurisprudence of the Commission and the Court has already been mentioned briefly. In what follows, these decisions, reports and judgments will be analysed more thoroughly. On this point, the European case-law shows an undeniable evolution towards the protection of

commercial speech by article 10 ECHR (Cohen-Jonathan, 1986; Boisson de Chazournes, 1988; Goux, 1988; Morse, 1990).

1. The first case on advertising regulation concerned a complaint against UK legislation preventing Independent Television from accepting advertisements of a political nature. The refusal to allow broadcasting time for political advertising has been evaluated by the European Commission within the scope of article 10 ECHR. With regard to the practice in different member states, the European Commission was of the opinion that 'it is clear that a number of these States do not permit advertising at all on radio and television, whereas other member States allow such advertisements but have, at the same time, laid down rules concerning the types of advertisements admitted'. In these circumstances the Commission concluded that the litigious limitations on television advertising were not to be seen as a breach of article 10 ECHR, because 'the provisions of Article 10, 1 should be interpreted as permitting the State, in granting a licence, to exclude, as in the present case, certain specified categories of advertisements' (X and Association of Z, 1971). So in this case, in 1971, the Commission concluded that article 10 paragraph 1 empowered a state to regulate radio and television advertising, whilst paragraph 2 of article 10 stayed out of the scope of evaluation of the Commission.
2. In a case in 1978, the prohibition of promotion and advertising in favour of unlicensed pirate radio stations or illicit broadcasting was seen as a restriction of the freedom of expression. Nevertheless, the restriction imposed was justified as being in accordance with the law and necessary in a democratic society for the prevention of crime, namely the promotion and encouragement of unlicensed pirate stations in their illegal activities. So this restriction of a typical type of advertising was evaluated by the Commission in the scope of paragraph 2 of article 10 ECHR. The Commission concluded that the interference complained of was covered by the terms of paragraph 2 of article 10 (X, 1978).
3. In more recent jurisprudence of the Commission and the Court, the global implementation of article 10 paragraph 2 on advertising is recognized in a more explicit manner, while at the same time the relative impact of this protection is marked in European case-law.

In the case of Pastor B. Jansen and the Scientology Church against Sweden, the European Commission was asked to examine the prohibition of an advertisement for a certain electronic instrument for measuring the mental and religious state of an individual (the so called 'E-meter'). The injunction of the Market Court against the advertisement for the E-meter was based on the argument that it was 'an invaluable aid to measuring man's mental state and changes in it'. The European Commission was of the opinion that the measure was seen as an interference with the freedom of expression of the applicants. In considering the 'necessity' of the measure challenged by the applicants, the Commission attached prior significance to the fact that 'the "ideas" were expressed in the context of a commercial advertisement'. The Commission explained that

although the Commission is not of the opinion that commercial 'speech' as such is outside the protection conferred by Article 10, 1, it considers that the level

of protection must be less than that accorded to the expression of 'political' ideas, in the broadest sense, with which the values underpinning the concept of freedom to expression in the Convention are chiefly concerned.

(Church of Scientology, 1979)

For that reason the Commission considered that there was no reason for a further examination of the injunction within the scope of article 10 ECHR and declared the application inadmissible.

The 1983 Liljenberg case was concerned with a sanction because of unlawful marketing and advertising for a certain pharmaceutical product under the name Max-I-Form. The European Commission recalled its former decision by considering, on the one hand that commercial advertisements and promotional campaigns are as such protected by article 10 of the ECHR, while on the other hand in the context of the examination of the justification of the interference, the Commission considered that 'the test of "necessity" should be a less strict one when applied to restraints imposed on commercial ideas' (Liljenberg, 1983). Furthermore, the Commission was of the opinion that 'the protection of consumers in respect of alleged pharmaceutical products is in principle an important public interest'. On these grounds the Commission concluded that the interference with the right of freedom of expression and information was in accordance with article 10 paragraph 2 ECHR.

4. The Barthold case was only indirectly linked to the discussion with regard to the protection of commercial speech. Although there might have been some publicity effect in an interview that gave rise to the litigious interference, the Commission was of the opinion 'that in fact the case is not at all concerned with commercial advertising in the sense that this term is generally understood'. In this, the Commission took the viewpoint that the criteria applicable to restrictions on advertisements were of no relevance in this case, recognizing in this way that specific criteria and standards are applicable in cases on advertising or commercial speech (Barthold, 1983). The Court's judgment in the Barthold case went in the same direction. The Court was of the opinion that all the various components of the interview had to be seen as a whole and that

it is not possible to dissociate from this whole those elements which go more to manner the presentation than to substance and which, so the German courts held, have a publicity-like effect. This is essentially so since the publication prompting the restriction was an article written by a journalist and not a commercial advertisement.

The Court nevertheless considered that a further enquiry into whether or not advertising as such comes within the scope of the guarantee of article 10 ECHR was not needed in the present case (Barthold, 1985).

In his concurring opinion Judge Pettiti was of the opinion that 'the Court could have been more explicit with regard to freedom of expression in as much as the approach to the question of commercial advertising was also evoked by the applicant'. Pettiti drew attention to the fact that the Commission and the Court

would be called on in future 'to rule more directly and comprehensively on the subject'. According to judge Pettiti's concurring opinion, commercial speech is directly connected with the freedom of expression and information. Pettiti argued:

Even if it were to be conceded that the State's power to regulate is capable of being more extensive in relation to commercial advertising, in my view it nevertheless remains the case that 'commercial speech' is included within the sphere of freedom of expression . . . albeit that commercial communications are afforded a different degree of protection to that granted in respect of the press.

(Barthold, 1985)

Although the Barthold judgment did not provide real support to the protection of commercial speech under article 10 ECHR, it has to be observed that this judgment can be seen as a further step by the Court in this direction. In an annotation to the Barthold judgment, J. De Meyer wrote: 'So deciding, the Court may appear to recognize after all, at least implicitly, that the right to freedom of expression also applies to commercial advertising' (De Meyer, 1985; see also Cohen-Jonathan, 1986).

5. The Markt Intern judgment undoubtedly made it clear that according to the European Court of Human Rights article 10 ECHR offers protection to commercial speech.

The report of the European Commission in the Markt Intern case is going in this direction already. The Commission was of the opinion that

even if, as a result of the domestic proceedings, it would have to be regarded as an established fact that the statements were made with the intention to influence competition, it does not necessarily follow from this that the statements are as such outside the scope of freedom of expression as defined in Article 10 par. 1.

The Commission expressed the opinion that

freedom of expression under Article 10 par. 1 of the Convention is an autonomous concept whose meaning is not necessarily in all details the same as its counterpart in domestic law. It clearly covers publications of any kind which convey an opinion or information.

The Commission concluded: 'The articulation of particular interests, including economic interests, cannot be a reason for excluding a publication from the scope of freedom of expression'. Furthermore, the Commission was of the opinion that 'the principle according to which the test of "necessity" in the second paragraph of Article 10 can be less strict when applied to commercial advertising is (in these circumstances) inapplicable' (Markt Intern, 1987). From this decision, one must

accept that the Commission recognized that in principle commercial information is protected by article 10 ECHR, albeit that this protection is to be situated on a lower level.

Finally, the European Court was even more explicit by considering the litigious article as 'information of a commercial nature'. The Court was of the opinion that 'such information cannot be excluded from the scope of Article 10 par. 1 which does not apply solely to certain types of information or ideas or forms of expression'. Although it should be noted that the European Court in this judgment recognized the protection of 'information of a commercial nature', which, strictly speaking, is not the same as advertising, nor does it necessarily include television commercials (Dommering, 1990; Kabel, 1990). As a matter of fact, neither the Scientology decision nor the Liljenberg decision, nor the Barthold or the Markt Intern case had to do with restrictions on 'pure' commercial advertising. In all these cases, the commercial character of the information was connected or subordinate to the informational, economic, political or philosophical aspect of the information.

Nevertheless, it cannot be denied that the Markt Intern case provides important support for the protection of commercial speech under the freedom of expression and information. In its report, the Commission situated 'commercial advertising' under the scope of article 10 paragraph 2 (Markt Intern, 1987), and the European judgment was very explicit as to the recognition of 'information of a commercial nature' under the scope of protection of article 10 ECHR (Markt Intern, 1989).

6. The decision of the European Commission of Human Rights in the Hempfing case demonstrates once more that commercial speech is protected by article 10 ECHR. In this case the European Commission examined whether a sanction, because of the distribution of a circular letter that constituted advertising for a lawyer, was justified under article 10 paragraph 2 ECHR. The Commission argued that the prohibition on direct advertising, as laid down in *German Rules for Lawyers' Professional Conduct*, was prescribed by law and is serving the purpose of protecting rights of others, namely of the public in general and of the members of the profession, as to the proper functioning of the services rendered by lawyers. But ultimately, the Commission was of the opinion that the inference in the freedom of expression of the applicant could, in the circumstances of the case, be regarded as necessary in a democratic society (Hempfing, 1991).
7. Finally, the Groppera Radio judgment has to be mentioned. In the Groppera Radio case the Court was of the opinion that the broadcasting of programmes over the air or by cable transmission is protected under article 10 ECHR, without there being any need to make distinctions according to the content of the programmes. So the majority of the Court could not agree with the concurring opinion according to which there could be no breach of article 10 ECHR because the limitations imposed by the Swiss authorities concerned 'essentially light entertainment and contained none of the kind of discussion or mere airing of views and expression of ideas or cultural or artistic events with which article 10 is concerned'. Furthermore, in the same concurring opinion it was mentioned that 'the radio station's essentially commercial objective accounts for the emphasis of

mere entertainment in its programmes', while 'article 10 is certainly not designed to protect either commercial operations or mere entertainment' (Groppera Radio, 1990). The Court was of the opinion that there was no reason to exclude this kind of programme from the protection of article 10 ECHR, although the Court ultimately decided that in the present case there was no breach of article 10 ECHR.

Another repercussion is that because of the Markt Intern judgment together with the Groppera Radio judgment, the legitimacy of regulation on television advertising must be argued within the scope of article 10 ECHR. Hence restrictions, formalities or sanctions in the field of television advertising must be 'necessary in a democratic society', must be based on pertinent arguments and should be applied in a proportionate way.

The scope and effect of the protection of commercial speech under article 10 ECHR

The recent European case-law made two things very clear. The first is that 'information of a commercial nature' falls under the protection of article 10 ECHR and the second is that the legitimacy of legislation and regulation on television broadcasting has to be evaluated from the scope of the second paragraph of article 10. Until now, however, the repercussions of these qualifications have not been very clear as to the practical effect on the protection of television advertising under article 10 ECHR.

The fact that commercial speech seems to receive less protection than other types of speech and information is undoubtedly a crucial element with regard to the effect on the protection of television advertising under article 10 ECHR. This lower degree of protection under article 10 ECHR is based on several grounds.

1. As already mentioned, the essential purpose of article 10 is to further a democratic society. Although it can be argued that speech in the commercial context may have some links with political speech and that restrictions on advertising can have important negative effects on the financing of the media, the democratic-functional aim of the ECHR in general and of article 10 in particular, is to be seen as the fundamental basis for the protection of the freedom of information. The economic interests of the media can be related to their freedom of expression, but they are not the fundamental issue. Reference can be made here to the viewpoint of the European Commission and its opinion 'that the protection of the commercial interests of particular newspapers or groups of newspapers is not as such contemplated by the terms of article 10 of the Convention' (Geillustreerde Pers, 1976). What is crucially at stake is the enforcement of an open democratic society. While political speech is a public good, commercial speech closely resembles a private good: most of the benefits of product advertising are gained by the producer in the form of increased sales. Reference can also be made to the situation under the US Constitution, where commercial speech is given less protection under the First Amendment than other forms of speech (Weinberg, 1982; Morse, 1990; Farber, 1991).

Within the framework of article 10 ECHR the protection of television advertising or information of a commercial nature is no aim in itself, but it is seen as an

intermediary instrument for a diversified or pluralistic variety of print and audio-visual media, in both the public and the private sector. This point of view is also expressed in Judge Pettiti's concurring opinion in the Barthold case, where it was noted that

freedom of expression in its true dimension is the right to receive and to impart information and ideas. Commercial speech is directly connected with that freedom. The great issues of freedom of information, of a free market in broadcasting, of the use of communication satellites cannot be resolved without taking account of the phenomenon of advertising; for a total prohibition of advertising would amount to a prohibition of private broadcasting, by depriving the latter of its financial backing.

(Barthold, 1985)

So the protection of commercial speech can be seen as interrelated with the economic activity and as the financial basis of the mass media. In other words, the economic aspect of a free market and the democratic aspect of a free market-place of ideas are interconnected, although not identical (See e.g. De Meyer, 1984; Bullinger, 1985).

Article 10 ECHR essentially offers protection to the freedom of expression and freedom of information in order to contribute to a democratic society and to offer the conditions for pluralism, tolerance and broadmindedness. The emphasis is on the societal and democratic function of freedom of expression and information, and not on the economic function in favour of particular interests. The concept of freedom of expression being chiefly concerned with political speech in the broadest sense, while commercial speech is nevertheless not excluded from this protection, ultimately leads to the fact that commercial speech will be protected to a lesser degree (Bullinger, 1985).

The protection given to commercial speech from this perspective also means that the level of protection is not to be argued on the economic interests of the media or the advertiser, but is to be determined in function of the right of freedom of information of the citizen and the consumer, as members of a democratic society. It is from this point of view that information of a commercial nature is seen to be protected on a different level by article 10 ECHR.

2. In the 1982 Recommendation on the international means to protect freedom of expression by regulating commercial advertising, the Parliamentary Assembly of the Council of Europe noted that statements of a commercial nature can be situated under the protection of article 10 ECHR, 'but that the level of protection may be less than that accorded to the expression of political ideas with which the values underlying the concept of freedom of expression in the convention are chiefly concerned' (Council of Europe, 1982).
3. The European Commission on Human Rights on several occasions held that the level of protection accorded to commercial speech by article 10

must be less than that accorded to the expression of 'political' ideas in the broadest sense, with which the values underpinning the concept of freedom of

expression in the Convention are chiefly concerned (and that) . . . the test of 'necessity' should be a less strict one when applied to restraints imposed on commercial ideas.

(Church of Scientology, 1979; Liljenberg, 1983).

In its Markt Intern report the European Commission recognized 'the principle according to which the test of "necessity" in the second paragraph of Article 10 can be less strict when applied to commercial advertising' (Markt Intern, 1987). In a recent decision of 7 March 1991, the European Commission drew attention to the fact that an infringement of the freedom of expression of a lawyer had nothing to do with a general discussion of a problem of society. Because of the fact that 'from the text and the circumstances of the applicant's letter, the advertising effect thus appears as his only motive', the Commission was of the opinion that there was no breach of article 10 ECHR (Hempfling, 1991). The Commission also took into consideration the fact that there was nothing to indicate that the contents of the applicant's circular letter were related to any public discussion or intended to inform the public or the addressees of the letter about a general problem. Thus the lawyer's private interest in advertising his services could not weigh against the rights of others in a proper functioning of the profession of lawyers.

4. In so far as the litigious article in the Markt Intern case conveyed 'information of a commercial nature', one can consider the acceptance by the Court of the interference in the applicants' freedom of expression as an indication for the fact that restrictions on commercial information are easier to be seen as fulfilling the necessity test in a democratic society. Taking into consideration the variety of aspects connected to the case as a whole, the Court explicitly took notice of the fact that 'the present article was written in a commercial context', before coming to the conclusion that in the light of these findings no breach of article 10 paragraph 2 ECHR had been established in the circumstances of the present case.
5. The manner in which the European Court in the Markt Intern case decided that there was no infringement of article 10 ECHR also demonstrates that restrictions in the field of 'information of a commercial nature' are not very strictly supervised by the European Court. It is therefore primarily left to the national authorities to decide which prohibitions and restrictions on commercial information are permissible. The Court is very explicit on that point in the Markt Intern case by considering that it is obvious that opinions may differ as to whether the Federal Court's reaction was appropriate or whether the statements made in the specific case by Markt Intern should be permitted or tolerated. However, the European Court of Human Rights should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be necessary'. According to the Court, the margin of appreciation is essential in commercial matters (Markt Intern, 1989).

It should be mentioned that until now, no report of the European Commission and no judgment of the European Court of Human Rights has ever established a breach of article 10 ECHR with regard to (an implementation of) advertising regulation.

6. A sixth and last argument with regard to the relative impact of the protection of

article 10 ECHR in the field of media regulation and restrictions on television advertising can be found in the actual legislation and recent case-law in some European countries, member states of the ECHR. An additional factor which further diminishes the level of protection of television advertising can be found in the fact that until now there still seems to be more tolerance with regard to restrictions and formalities within the field of regulation of broadcasting as there is *vis-à-vis* other means of communication-media, as, for example, the printed press. Restrictions, quota, prohibitions and formalities that are seen as incompatible with the freedom of the Press in most member states are seen as necessary in the context of broadcasting regulation in the member states. It has to be observed that the general practice in the member states of the Convention can be an important element in the final evaluation of the admissibility of restrictions on the freedom of expression and information.

The recent legislation and jurisprudence in the member states demonstrates that at this national level restrictions on television advertising are not countered by a high level of protection by article 10 ECHR, while it has to be observed that the European Court mainly leaves it to the national legislators and the national judges to evaluate the necessity of these restrictions.

CONCLUSIONS

Everyone seems to agree that political speech lies at the core of the First Amendment's protection. At the periphery are forms of speech such as pornography and commercial advertising.

(Farber, 1991)

This quote with regard to the constitutional protection of advertising in the United States also typically illustrates the 'European' approach towards the protection of commercial speech, as guaranteed by article 10 ECHR.

With regard to the case-law of the European Commission and the European Court, the conclusion is that the freedom of commercial speech is not given very much additional protection within the framework of article 10. The European Court may after all recognize the protection of information of a commercial nature under the umbrella of article 10 ECHR, but in the end the Court does not link wide repercussions to that qualification. In so far as the restrictions on advertising are sufficiently clear and consistent as to enable the media and commercial operators and their advisers to regulate their conduct in the relevant sphere, the restrictions on advertising will relatively easily be seen to be in accordance with article 10 ECHR.

The final question with regard to the protection of television advertising offered by article 10 ECHR can be formulated as follows: 'Which is the preferable proposition. To be bitten by the cat of the non-applicability of article 10, par. 1 or by the subsequent dog of the margin of appreciation of the admissible grounds of restriction of article 10, par. 2?' (Kabel, 1990). Indeed, there are clear indications that what is offered by the ECHR on the one hand (the applicability of article 10 concerning commercial information) is largely invalidated again on the other

hand (the limited supervision and the tolerant attitude towards the necessity condition).

In future, much will depend on the policy of the national authorities and the way in which the national courts will evaluate the social necessity of some of the restrictions on television advertising. According to the case-law of the European Court of Human Rights a wide 'margin of appreciation' is left to the member states on this issue, which diminishes clearly the importance of article 10 ECHR and the supervision by the European Court. At the same time, commercial speech as a specific 'information-category' is only offered a lower level of protection. Besides, restrictions on television advertising for the protection of consumers and with respect to the protection of children in particular, can count on a far-reaching level of tolerance within the framework of the second paragraph of article 10 ECHR.

It is clear however that article 10 ECHR is not a static rule, but a living instrument of human rights' protection. In recent years it has become clear that national legislators, national courts and national administrations are becoming aware of the importance of this instrument, which leads to a dynamic and expanding influence of article 10 and of the freedom of expression and information with all kinds of societal implications. The future will make clear if and to what extent television advertising will in practice profit from the protection that article 10 ECHR offers to 'information of a commercial nature'. The actual impact of article 10 ECHR on the regulation of television advertising is rather symbolic.

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Effectiveness and Efficiency in Privatization Advertising

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The privatization of a number of British nationalized industries during the 1980s involved the use of substantial marketing and, in particular, advertising expenditure. When the same or similar activities are repeated, some experience or learning curve effect can be expected, such that the relative efficiency of performing that activity rises. From an examination of the objectives for and the process of, privatization, a learning curve effect might be expected that would result in a progressive lowering of privatization marketing and advertising costs.

The data on privatization from 1981 to 1989 shows the expected learning curve effect for total marketing cost, the total cost reducing over subsequent privatizations. However, the relative cost of advertising first rose and then failed to fall, even when the objectives for privatization changed from widening share ownership to deepening it. The expected learning curve is not then observable, leading to the conclusion that inefficiency existed in the advertising of privatizations, particularly in the late 1980s, and that considerable sums could have been saved if a different strategy had been followed.

THE OBJECTIVES OF PRIVATIZATION

This paper is concerned with assessing whether the (substantial) expenditures on the marketing of privatizations in Britain and, in particular, those on advertising share offers represented effective and efficient expenditure. To judge effectiveness the achievements of privatization need to be measured against the objectives set for them. Various objectives have been suggested for the privatization of state owned concerns (see, for example, Hyman, 1989b; Veljanovski, 1988; Letwin, 1988). Hyman's list most closely reflects that originally adopted by the British government which was in turn based on a Bow Group discussion paper (Fielding, 1979). These are:

1. Wider share ownership.
2. Increased efficiency and profit motivated decisions.
3. Reduced government interference; increasing the speed of decision-making.
4. Introduction or enhancement of competition.